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601613—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 183

CONRAD MARINO AND GABRIEL VIGORITO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 82–86) is reported at 141 F. (2d) 771.

JURISDICTION

The judgment of the circuit court of appeals was entered May 23, 1944 (R. 88). The petition for a writ of certiorari was filed June 22, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules

XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence introduced on behalf of petitioners in support of a statutory exception was so conclusive as to have required, in the absence of rebuttal testimony by the Government, the direction of a verdict of acquittal.

2. Whether petitioners were deprived of a fair trial (a) by the failure of the trial court to correct an alleged misstatement in the summation of the prosecuting attorney, or (b) by the court's misstatement in its charge to the jury of certain items of evidence.

STATUTE INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in part:

> (a) REQUIREMENT.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this section shall not apply to—
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> * * * * *
>
> (6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale * * *.
>
> * * * * *

(g) PENALTIES.—Any person who violates any provisions of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of New York on April 29, 1943, on an indictment charging them in two counts with the possession and transportation of distilled spirits in containers on which there were not affixed stamps denoting the quantity of the spirits contained therein and evidencing payment of all internal revenue taxes, in violation of Section 2803 (a) of the Internal Revenue Code (R. 4, 6–7). Each of the petitioners was sentenced to imprisonment for one year and six months on each count, the sentences to run concurrently (R. 4). On appeal to the Circuit Court of Appeals for the Second Circuit the convictions were affirmed (R. 82–86).

The evidence for the Government was substantially as follows:

On the afternoon of Saturday, December 26, 1942, in Brooklyn, N. Y., three agents of the Alcohol Tax Unit of the Treasury Department, after certain observations, proceeded by automobile to follow another automobile (R. 11, 21). The automobile being followed turned a corner

(R. 11, 22). The agents, reaching the same corner, stopped to observe (R. 11, 22). The car under observation had drawn up at the curb, and the agents saw petitioners get out (R. 11, 22). Petitioner Marino then opened the rear door, looked up, and seeing the agents' car, glanced at petitioner Vigorito and slammed the door shut (R. 11, 22). The agents then started their car and as they proceeded, petitioner Marino again opened the rear door (R. 11, 22). At this point the agents approached petitioners, and while doing so, they saw petitioner Marino take a carton from the back seat of the car (R. 12, 22). The agents investigated and discovered that in the carton was an unstamped tin can containing about 3½ gallons of alcohol (R. 14–15, 22), which, upon subsequent analysis by a government chemist, was found to be ethyl alcohol, 89.37 percent by volume, fit for beverage purposes (R. 29).[1] The chemist characterized the alcohol as "a run-of-the-mill of bootleg alcohol" (R. 29).

The agents testified that, upon questioning petitioner Vigorito at the time, he said that he owned several trucks and planned to use the alcohol as an antifreeze (R. 12, 25); that he had purchased it for 80 cents a gallon from a garage "around the corner" about an hour before (R. 12, 22). Petitioner Marino, who was questioned separately,

[1] A motion to suppress evidence was denied prior to trial (R. 3–4).

stated to one agent that there was "nothing" in the package and to another that he did not know where the alcohol came from (R. 12, 22). The agents and petitioners then proceeded to the garage in question (R. 12–13, 23). However, it was closed and securely locked (R. 12–13, 23). Thereupon, petitioner Vigorito remarked that it had been open an hour before when they had acquired the alcohol from a "young fellow" whom he would "produce at the right time" and who had taken it "out of a barrel in a small room off of the office" (R. 13). On Monday, December 28, 1942, the agents secured admission to the garage and found it filled with new trucks, but without a trace of alcohol in the indicated small room (R. 13–14). The Government chemist testified that radiator alcohol is denatured ethyl alcohol and has an odor unlike the alcohol found in petitioners' possession (R. 29); that that alcohol would be "expensive stuff" to use as a radiator antifreeze (R. 31).

In defense petitioners offered the testimony of one Feioto, petitioner Vigorito's brother-in-law (R. 35), and also testified in their own behalf.

Feioto testified that on December 26, 1942, he was employed as a handyman at the garage in question; that while the garage was closed, the cellar, which he had been cleaning, was open (R. 33). Petitioners were driving past the garage and stopped to talk to him (R. 33). In the course of the conversation, he told petitioners that he had

found "some radiator alcohol * * * in the cellar" and asked them whether they could use it (R. 33–34). When petitioners replied in the affirmative, he went down into the cellar, brought up the alcohol in a tin box, and deposited it in the back of petitioners' car (R. 34). Petitioners then departed (R. 34). He knew the alcohol was radiator alcohol because he had "smelled radiator alcohol once before" (R. 35–36).

Petitioners testified substantially to the same effect as Feioto (R. 38–45), adding that they gave Feioto $2.50 for the alcohol (R. 41) and that they were intercepted by the agents on their way home (R. 40–41, 44). Each of the petitioners testified that their sole purpose was to use the alcohol as an antifreeze and that they had no intention of selling it or of using it to manufacture any product for sale (R. 40–42). On cross-examination petitioner Marino admitted that at a "hearing" the week before, he had stated that he had purchased the alcohol from a man on the corner whom he would recognize if he saw him (R. 43–44).

Petitioner Vigorito admitted convictions for grand larceny, dealing in stolen automobiles, and coercion (R. 38–39). Petitioner Marino admitted a conviction for automobile theft (R. 43).

The Government put on no witnesses in rebuttal (R. 45). At the close of all the evidence petitioners moved for direction of a verdict on

the ground that there had been no contradiction of their defense (R. 45).[2] The trial judge denied the motion and petitioners excepted (R. 45). In submitting the case to the jury, the court charged that "the Government made out a prima facie case in their allegations by alleging the possession and the failure to affix a stamp, but the question now is whether they had it in their possession for sale. The burden is still on the Government to prove that beyond a reasonable doubt" (R. 51).

ARGUMENT

1. Laying aside superficialities in their argument, petitioners' position is that the Government made out only a minimal case of possession and transportation of distilled spirits in an unstamped container, and that this was so completely overcome by uncontradicted and unimpeached testimony[3] that the spirits were not intended for

[2] Specifically, petitioners asserted in their motion for a directed verdict that "the evidence in the case fails to establish a crime under the statute, on the ground that it does not appear beyond a reasonable doubt that the case was not within that specific statutory exemption" (R. 45).

[3] In this connection petitioners rely primarily upon the testimony of Feioto. They seem to recognize that if they depend solely on their own testimony, it was proper for the trial judge to deny their motion for a directed verdict since a question of credibility was involved in view of their manifest interest and their criminal records (See p. 6, *supra*). Cf. *Wheeler* v. *United States*, 80 F. (2d) 678 (C. C. A. 5); and see *United States* v. *Sebo*, 101 F. (2d) 889 (C. C. A. 7); *Ward* v. *United States*, 96 F. (2d) 189 (C. C. A. 5).

sale, and hence were within an exception in the statute, as to have required the direction of a verdict.

The difficulty with petitioners' argument is, we submit, that it does not reflect the true state of the evidence. The Government in its proof established considerably more than the mere transporting and possession of distilled spirits in an unstamped container. In and of itself this evidence was sufficient to warrant a finding that petitioners did not possess and transport the spirits for the innocuous purpose of using them as an antifreeze, as was asserted. Inconsistent with an innocent use of the alcohol were the following factors: The unusual actions of the petitioners when they observed the agents' car while they were unloading the alcohol; petitioner Marino's statement to one agent that he did not know where the alcohol came from, or indeed, what was in the package, whereas petitioner Vigorito told another agent that he had purchased the alcohol an hour before from a garage "around the corner"; the peculiar circumstance that although the agents proceeded immediately to the garage in which the alcohol was said to have been obtained, the garage was locked and closed, despite the fact that it was still afternoon; petitioner Vigorito's assertion that the "young fellow" he would produce "at the right time" obtained the alcohol from a barrel in a small room

adjoining the garage office, as contrasted with the failure of the agents to find any trace of alcohol in that room when they, two days later (a Sunday intervening), gained admission to the garage; and the acquisition by petitioners as an antifreeze of a product ordinarily used not for that purpose but as a "bootleg" beverage, which normally would be too expensive to be used as a nonfreeze (*supra*, pp. 3–5).

But support for a conclusion that the alcohol was not possessed for a legitimate purpose, as petitioners claim, does not rest upon the Government's evidence alone; it is bolstered by inconsistencies between the trial testimony of petitioners and earlier statements which they made to the officers and by a forthrightness in their trial testimony which was lacking when the officers questioned them. Thus, petitioner Vigorito, in testifying, stated that the alcohol had been taken from the cellar (R. 39–40), whereas, almost contemporaneously with the event, he told one of the officers it had come from a room adjoining the office of the garage. Further, he was able at the trial to state with certainty that he had obtained the alcohol from his brother-in-law Feioto, who had found it in the cellar (R. 39), although at the time he was apprehended he could identify Feioto only as a "young fellow" whom he would "produce at the right time." Petitioner Marino at the trial concurred in petitioner Vigorito's ver-

sion of what had occurred (R. 42), although, when apprehended, he did not know where the alcohol came from or even what was in the package.

The testimony of Feioto, upon which petitioners so strongly rely, is subject not only to the same infirmity that credulity is strained by the story of all three as to the circumstances under which alcohol of a beverage character was obtained by petitioners as an antifreeze, but is otherwise vulnerable. Feioto testified that he knew definitely that the alcohol was radiator alcohol, predicating his identification on his knowledge of the smell of radiator alcohol (R. 35), but a government chemist, who was an expert, stated that the alcohol did not have the odor of radiator alcohol. And of course the relationship of Feioto, although not dispositive, was a factor which the trial judge was entitled to consider in appraising his testimony.[4] Clearly, the testimony of Feioto, from the standpoint of probative value, was not sufficient to require the trial court to grant an instruction which would amount to a command to the jury to accept it as the truth.

In short, when the testimony is viewed as a whole, we do not believe that there can be any doubt that the state of the evidence was such as to make it unnecessary for the Government to adduce further proof when the defendants had

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[4] Cf. *Arnall Mills* v. *Smallwood*, 68 F. (2d) 57, 59 (C. C. A. 5).

rested, or that the case was one for disposition by the jury rather than by the trial judge.[5]

2. (a) Petitioners assert (Pet. 5, 14–16) that they were prejudiced by remarks alleged to have been made by the prosecutor during his summation to the effect that there was an issue of veracity as between the government agents and the defense witnesses; petitioners claim that there was no basis in the evidence for such an argument. However, neither the specific comments of which petitioners complain nor the context are included in the record, and neither is the summation of petitioners' counsel (see R. 46–48).[6] There is,

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[5] *Ezzard* v. *United States*, 7 F. (2d) 808 (C. C. A. 8), the authority principally relied upon by petitioners and asserted to be in conflict with the decision below (Pet. 6–7, 14), is readily distinguishable. There it was held, in a prosecution for illegal possession of narcotics under a statute providing that possession shall be presumptive evidence of a violation, that a motion for a directed verdict of acquittal should have been granted where the defendant had offered credible and uncontradicted testimony of several disinterested witnesses to support his contention of innocent possession. One judge dissented on the ground that a question of fact was presented by the evidence. The *Ezzard* case was distinguished on its facts by the same court the following year. *Weeke* v. *United States*, 14 F. (2d) 398, 400 (C. C. A. 8), certiorari denied, 273 U. S. 662.

[6] The record contains only the objection of petitioners' counsel to the remarks in question and the ensuing colloquy between the court and counsel. Petitioners' statement (Pet. 15) that the trial court refused to permit the reporter to take the prosecutor's summation does not completely describe the incident. The request was made during the prosecutor's summation and after petitioners' counsel had completed his summation. The court therefore declined to grant the re-

therefore, no basis for appellate review of the incident. *Vause* v. *United States,* 53 F. (2d) 346, 354 (C. C. A. 2), certiorari denied, 284 U. S. 661; *Murphy* v. *United States,* 39 F. (2d) 412, 414 (C. C. A. 8); *Hoffman* v. *United States,* 20 F. (2d) 328, 329 (C. C. A. 8); *Silkworth* v. *United States,* 10 F. (2d) 711, 721 (C. C. A. 2), certiorari denied, 271 U. S. 664. Moreover, clearly the defense testimony offered to show that petitioners' possession and transportation were within the statutory exception was not consistent with their conduct and explanation as reflected in the testimony of the Government witnesses. Accordingly, in that sense, an issue was raised as to the truth of the defense testimony. That issue was, therefore, a proper subject of the prosecuting attorney's summation.[7]

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quest on the ground that it should have been made at the opening of the summations in order to afford the prosecutor an opportunity to ask that the defense summation be recorded (R. 46).

[7] By the same token there is no merit in petitioners' objection (Pet. 15–16) that the trial judge in his instructions improperly framed an issue of veracity as between the Government and defense witnesses. The only exception in this respect which petitioners took was to the judge's reference to the conflict in the testimony as to the place where the spirits had allegedly been kept (R. 58), the judge having pointed out in his charge that the agent had testified that Vigorito had stated to him that he had obtained the spirits from a barrel in a small room off the office of the garage, whereas Feioto had testified that he got the spirits from the cellar (R. 52–53). The judge's comments in this regard were entirely consistent with the evidence (see R. 13, 33–34).

(b) Petitioners' contention (Pet. 16) that the trial court's misstatement in its instructions of certain items of evidence requires a reversal of their convictions, is unavailing.[8] Although petitioners did take certain exceptions to the instructions (see R. 58–59), they did not object to the statements of which they now complain and must be presumed to have acquiesced therein. Therefore, their contention, raised for the first time on appeal, presents nothing for review, for, as was

[8] Petitioners point first to a statement of the trial court that "they got the stuff to use it as a non-freeze in trucks; and, of course, it was testified here that that was kind of a high price to pay for a non-freeze" (R. 53). The court was referring to the testimony of the government chemist that the alcohol was "expensive stuff for a radiator" (R. 31). The court below properly held that at most the characterization of the alcohol in terms of price was a slip of the tongue which most probably did not mislead the jury (R. 84). Petitioners' other objection is to the trial court's rhetorical question whether petitioners knew that the persons who observed them in the act of removing the carton containing the alcohol from the car, were government agents, and consequently whether their conduct in not completing the act until after the agents had passed on, was consistent with innocence (R. 54). There appears to have been no evidence that petitioners actually knew that the men who were observing them were government agents. In the court below, Judges Clark and Chase thought, it seems to us correctly, that under the circumstances the comment was not improper; Judge Frank felt that it added to the actual evidence and hence was prejudicial. All agreed, however, that petitioners' failure to call the trial court's attention specifically to the matter at the time and to seek a correction left no occasion for a reversal (R. 85).

held in *Allen* v. *United States,* 4 F. (2d) 688, 694 (C. C. A. 7), certiorari denied subnom *Hunter* v. U. S., 267 U. S. 597:

> Errors in the instructions should be pointed out specifically before the jury retires, and the court should be given an opportunity of correcting its mistake or oversight. This rule is dictated by public policy, and prevents new trials and unnecessary expense.

See also *Johnson* v. *United States,* 318 U. S. 189, 199–200; *Allis* v. *United States,* 155 U. S. 117, 122–123; *United States* v. *Manton,* 107 F. (2d) 834, 846–847 (C. C. A. 2), certiorari denied, 309 U. S. 664.

CONCLUSION

The case was correctly decided below. There is involved no conflict of decisions or question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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